A

YONG TOI MEE & ANOR

v.

MALPAC CAPITAL SDN BHD & ANOR

B

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
ABDULL HAMID EMBONG FCJ
SURIYADI HALIM OMAR FCJ
HASAN LAH FCJ
C JEFFREY TAN FCJ
[CIVIL APPEAL NO: 02(f)-69-10-2012(A)]
4 SEPTEMBER 2013

CONTRACT: *Conditional contract - Conditions precedent - Whether*
D *conditions to allow decree of specific performance to issue satisfied - Whether party resisting specific performance regarded contracts as lapsed - Whether mutual agreement to suspend contract suspended all contractual obligations - Whether affirmation of suspended contract by one party revived contract for purpose of specific performance - Whether contracts*
E *void for failure to fulfill condition precedent - Whether ss. 32 to 34 of Contracts Act 1950 applied to suspended contracts containing unfulfilled conditions precedent*

The appellants and the respondents entered into three agreements
F ('the agreements') for the appellants to buy the entire paid-up capital of the second respondent and, in the process, acquire ownership over certain plantation lands, mill and machinery ('the assets') which were due to be transferred to the second respondent. The assets were initially offered by Special
G Administrators ('SAs') under the Pengurusan Danaharta Nasional Berhad Act 1998, to the first respondent in part settlement of monies owed to it by the chargor of the assets. The first respondent, however, requested the SAs to transfer the assets to its nominee, the second respondent. Under the agreements, which
H involved a total consideration of RM53 million, the appellants paid the respondents RM4.1 million as deposits. The agreements were subject to the fulfillment of various conditions precedent by the respondents, *ie*, getting the SAs, to transfer the assets to the second respondent free of encumbrances and getting approvals
I from the State Government and the Foreign Investment

Committee to the transfer of the assets. Following the execution of the agreements, the first respondent delegated management of the assets to the appellants and their nominees under a profit-sharing arrangement under which the respondents were guaranteed RM500,000 per month (RM6 million per year) and another RM25,000 for rental of the mill. Seven months after the agreements were signed, the respondents issued a letter to the appellants ('the letter') confirming their mutual agreement "... that for the moment each of us shall be entitled, but reserved our respective rights, to terminate the overall arrangement and understanding (including the Shares Agreement of 5 April 2002 which lapsed on 5 October 2002 since all relevant approvals have not been obtained) to enable each of us to consider our respective positions". Considering the letter as intending to put time for completion at large to enable the first respondent to satisfy the conditions precedent, the appellants sought to complete the agreements by paying the respondents the balance purchase price due thereunder. The respondents rejected the move. They regarded the agreements as having lapsed due to their failure to satisfy the conditions precedent on time. They also regarded the letter as a 'suspension agreement' to enable the parties to re-negotiate a fresh agreement for the sale of the assets. The appellants sued for specific performance of the agreements. The respondents counterclaimed that the agreements were void and of no legal effect. The High Court granted judgment to the appellants. On appeal, the Court of Appeal ('COA') set aside the decree of specific performance and ordered the High Court to hear the counterclaim. The counterclaim was dismissed by the High Court. In its decision, the COA held that the High Court was wrong to have ordered specific performance when the agreements continued to remain suspended and when the conditions precedent had not been fulfilled. The COA noted that the respondents still retained part of the deposits that had been paid by the appellants and that the latter continued to jointly manage and operate the assets "by virtue of the 15 November 2002 letter which governed the further relationship between the parties after the suspension of the agreements". The appellants obtained leave to appeal to the Federal Court. On the question, *inter alia,* whether ss. 32 to 34 of the Contracts Act 1950 ('CA') applied to suspended contracts containing conditions precedent to be fulfilled.

Held (allowing appeal with costs)
Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

(1) Sections 32, 33 and 34 of the CA fell under Part IV falling under 'of contingent contract' and therefore the question was answered in the affirmative. (paras 35 & 36)

(2) The COA had misdirected itself when it stated that the conditions precedent remained unfulfilled. The statement of agreed facts showed that the major conditions precedent had been satisfied way before 15 November 2002 letter was issued. (para 28)

(3) The notice of termination was only served on the appellants on 28 November 2007, by which time the conditions precedent had already been satisfied. With the conditions precedent satisfied what remained thereafter was performance. There was no reason for the respondents to validly resist the decree of specific performance after the impediments had been cleared in the circumstances of the case. The *raison d'etre* for the 15 November 2002 letter vanished with the fulfillment of the conditions precedent. (para 29)

(4) Appreciating the conduct of the respondents and deciphering the letter, not for a moment did the respondents assert that the composite agreements were void on account of the failure to fulfill the conditions precedent. Instead, as the respondents alleged, the parties were to take a breather, do what was needed to be done, and then decide whether to terminate the contracts or otherwise. (para 27)

(5) The respondents' conduct of retaining part of the consideration sum paid by the appellants for the purchase of the second respondent did not help the respondents' case and gave the indication that they had not abandoned the composite agreements. In their letter to KLSE on the new profit-sharing agreement between themselves and the appellants, the respondents stated that the RM4.1 million was deposited on an interest-free basis for the duration of the suspension agreement. The retention of the returnable deposits free of interest for a period of over five years militated against the respondents' argument that the contracts had lapsed. (paras 31 & 32).

(6) Financial considerations could not be discounted as one of the reasons why the respondents did not terminate the composite agreements as the respondents, under their profit-sharing agreement with the appellants, were guaranteed RM500,000 per month payment (RM6 million per year) and RM25,000 as rental for the mill. (para 33)

(7) It was only on 28 November 2007, *ie*, more than five years later, that the first respondent finally served notice of termination of the composite agreements and offered to tender the refund of the RM4.1 million deposit. By then, all the conditions precedent had been fulfilled. (para 34)

[Setting aside all orders of the Court of Appeal and reinstating the orders of the High Court; reinstating the decree of specific performance, dismissing the counterclaim and ordering the balance sum of RM48.9 million to be refunded within one month of the date of the order.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu dan responden-responden memasuki tiga perjanjian ('perjanjian-perjanjian tersebut') untuk perayu-perayu membeli kesemua modal berbayar responden kedua dan, dalam proses tersebut, memperolehi milikan terhadap tanah pertanian, kilang mesin-mesin tertentu ('aset-aset') yang sepatutnya dipindah milik kepada responden kedua. Aset-aset tersebut pada asalnya ditawarkan oleh Pentadbir-Pentadbir Khas ('PK') di bawah Akta Pengurusan Danaharta Nasional Berhad 1998 kepada responden pertama sebagai sebahagian daripada wang penyelesaian yang dihutangkan kepadanya oleh penggadai aset-aset tersebut. Walau bagaimanapun, responden pertama meminta PK untuk memindah milik aset-aset di bawah penamanya, responden kedua. Di bawah perjanjian-perjanjian tersebut, yang mana melibatkan jumlah balasan sebanyak RM53 juta, perayu-perayu membayar kepada responden-responden RM4.1 juta sebagai deposit. Perjanjian-perjanjian tersebut adalah tertakluk kepada penunaian beberapa syarat-syarat awalan oleh responden-responden iaitu, menguruskan pindah milik aset-aset oleh PK responden kedua tanpa apa-apa bebanan dan mendapatkan kelulusan-kelulusan daripada Pihak Berkuasa Negeri dan Jawatankuasa Pelaburan Asing untuk memindah milik aset-aset tersebut. Berikutan pemeteraian perjanjian-perjanjian tersebut, responden pertama memindahkan pengurusan aset-aset tersebut kepada perayu-perayu dan penama-penama mereka di bawah

pengurusan perkongsian keuntungan yang di bawahnya responden-responden dijamin RM500,000 sebulan (RM6 juta setahun) dan tambahan RM25,000 bagi sewa kilang tersebut. Tujuh bulan selepas perjanjian-perjanjian tersebut ditandatangani dan responden-responden mengeluarkan surat kepada perayu-perayu ('surat') mengesahkan perjanjian bersama mereka "... that for the moment each of us shall be entitled, but reserved our respective rights, to terminate the overall arrangement and understanding (including the Shares Agreement of 5 April 2002 which lapsed on 5 October 2002 since all relevant approvals have not been obtained) to enable each of us to consider our respective positions". Mempertimbangkan surat tersebut sebagai berniat untuk meletakkan masa penyelesaian sebagai terbuka untuk membolehkan responden pertama memenuhi syarat awalan tersebut, perayu-perayu memohon untuk menyelesaikan perjanjian-perjanjian tersebut, dengan membayar kepada responden-responden, baki harga belian yang masih tertunggak di bawahnya. Responden-responden menolak cadangan tersebut. Mereka menganggap perjanjian-perjanjian tersebut sebagai tamat disebabkan kegagalan mereka memenuhi syarat-syarat awalan dalam tempoh yang ditetapkan. Mereka juga menganggap surat tersebut sebagai 'suspension agreement' untuk membolehkan pihak-pihak merundingkan semula perjanjian baru bagi jualan aset-aset. Perayu-perayu menyaman bagi pelaksanaan spesifik perjanjian-perjanjian tersebut. Responden-responden menuntut balas bahawa perjanjian-perjanjian tersebut adalah batal dan tidak mempunyai kesan undang-undang. Mahkamah Tinggi memberikan penghakiman kepada perayu-perayu. Atas rayuan, Mahkamah Rayuan ('MR') mengenepikan dekri pelaksanaan spesifik dan memerintahkan Mahkamah Tinggi mendengar tuntutan balas tersebut. Tuntutan balas tersebut ditolak oleh Mahkamah Tinggi. Dalam keputusannya, MR menyatakan bahawa Mahkamah Tinggi telah terkhilaf dalam memerintahkan pelaksanaan spesifik apabila perjanjian-perjanjian tersebut masih tertangguh dan apabila syarat-syarat awalan tidak dipenuhi. MR membuat pemerhatian bahawa responden-responden masih menyimpan sebahagian deposit yang telah dibayar oleh perayu-perayu dan kemudian meneruskan untuk mengurus dan mengendalikan bersama aset-aset "by virtue of the 15 November 2002 letter which governed the further relationship between the parties after the suspension of the agreements". Perayu-perayu memperolehi kebenaran untuk merayu ke Mahkamah Persekutuan

atas persoalan, antara lain, sama ada ss. 32 hingga 34 Akta Kontrak 1950 ('AK') terpakai kepada kontrak yang tertangguh yang mengandungi syarat awalan untuk dipenuhi.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

(1) Seksyen-seksyen 32, 33 dan 34 AK terangkum di bawah Bahagian IV yang terangkum di bawah 'kontak kontingen' dan oleh itu persoalan yang dikemukakan dijawab secara afirmatif.

(2) MR tersalah arah dalam menyatakan bahawa syarat-syarat awalan masih belum dipenuhi. Pernyataan fakta-fakta yang dipersetujui menunjukkan bahawa syarat awalan yang penting telah dipenuhi jauh sebelum surat 15 November dikeluarkan.

(3) Notis pembatalan perjanjian hanya diserahkan kepada perayu-perayu pada 28 November 2007, yang mana pada masa tersebut, syarat awalan telah pun dipenuhi. Dengan pemenuhan syarat awalan, apa yang tinggal hanyalah pelaksanaan. Tidak ada sebab untuk responden-responden menyangkal secara sah dekri pelaksanaan spesifik selepas halangan-halangan telah diselesaikan dalam hal keadaan kes. Alasan untuk surat 15 November 2002 lenyap dengan pemenuhan syarat awalan tersebut.

(4) Menilai tindakan responden-responden dan mentafsir surat tersebut, tidak ada pada bila-bila masa pun, responden-responden ada menyatakan bahawa gabungan perjanjian-perjanjian tersebut adalah batal atas alasan kegagalan memenuhi syarat-syarat awalan. Sebaliknya, responden-responden mendakwa, pihak-pihak perlu mengambil masa, lakukan apa yang perlu dilakukan dan kemudian memutuskan sama ada hendak membatalkan kontrak-kontrak atau sebaliknya.

(5) Tindakan responden-responden menyimpan sebahagian jumlah balasan yang dibayar oleh perayu-perayu bagi belian responden kedua tidak membantu kes responden-responden dan memberikan indikasi bahawa mereka tidak mengendahkan perjanjian-perjanjian komposit tersebut. Dalam surat mereka kepada BSKL berkaitan perjanjian perkongsian keuntungan baru antara mereka dan perayu-perayu, responden-responden menyatakan bahawa jumlah RM4.1 juta didepositkan atas

dasar tanpa faedah bagi tempoh penangguhan perjanjian tersebut. Penyimpanan deposit tanpa faedah yang boleh dikembalikan bagi tempoh melebihi lima tahun menyekat hujahan responden-responden bahawa kontrak-kontrak tersebut telah tamat.

(6) Balasan kewangan tidak boleh diketepikan sebagai salah satu alasan mengapa responden-responden tidak membatalkan perjanjian-perjanjian komposit tersebut kerana responden-responden, di bawah perjanjian perkongsian keuntungan dengan perayu-perayu, dijamin bayaran RM500,000 sebulan (RM6 juta setahun) dan RM25,000 sebagai sewa kilang tersebut.

(7) Hanya pada 28 November 2007, iaitu lebih lima tahun kemudian, barulah responden pertama menyerahkan notis pembatalan perjanjian-perjanjian komposit dan menawarkan tender untuk pengembalian deposit RM4.1 juta. Dalam tempoh tersebut, kesemua syarat awalan telah dipenuhi.

[Mengenepikan kesemua perintah Mahkamah Rayuan dan menghidupkan semula perintah-perintah Mahkamah Tinggi; menghidupkan semula dekri pelaksanaan spesifik, menolak tuntutan balas dan memerintahkan baki jumlah sebanyak RM48.9 juta dikembalikan dalam tempoh satu bulan dari tarikh perintah.]

Case(s) referred to:

Central Bank of India v. Hartford Fire Insurance AIR 1965 SC 1288 ***(refd)***

Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd [2003] 3 CLJ 201 CA ***(refd)***

Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 All ER 98 ***(refd)***

Kamla Devi v. Takhatmal AIR 1964 SC 859 ***(refd)***

Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(refd)***

National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***

Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd [2006] 2 CLJ 337 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 32, 33, 34

For the appellants - Cyrus Das (A Iruthaya Raj & Capt Abdul Razak Hashim with him); M/s Raj Selva & Co
For the respondents - DP Naban (Logan Sabapathy, Ang Hean Leng & Yong Shih Han with him); M/s Logan Sabapathy & Co

[Appeal from Court of Appeal; Civil Appeal No: A-02-1449-2011]

Reported by Ashok Kumar

JUDGMENT

Suriyadi Halim Omar FCJ:

[1] We are dealing with an appeal now. Being aggrieved by the decision of the Court of Appeal the plaintiffs ('hereinafter referred to as the appellants'), had successfully obtained leave from the Federal Court on 1 October 2012 to have the following questions determined by us, namely:

(i) whether ss. 32 to 34 of the Contracts Act 1950 apply to suspended contracts containing conditions precedent to be fulfilled;

(ii) whether in the circumstances reliance on the cases of *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282; [1983] 2 MLJ 211 and *Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd* [2003] 3 CLJ 201; [2003] 4 MLJ 152 as stating the correct law on contingent contracts could apply to contracts containing conditions precedent which are suspended;

(iii) where a contract has been suspended by mutual agreement of the parties, whether time for performance is also thereby suspended;

(iv) where a contract between parties has been mutually suspended as opposed to being terminated, whether all contractual obligations thereunder are likewise suspended until revival of the contract or its earlier termination;

(v) whether affirmation of the suspended contract by one of the parties in the aftermath of the suspension revives the contract for purposes of specific performance; and

(vi) whether a vendor under a contract for sale whose obligation was to fulfill the conditions precedent could take advantage of his own failure to say that time has run out following a temporary suspension of the contract?

[2] This appeal came about as the appellants had commenced an action on 21 April 2007 at the High Court against the defendants seeking, *inter alia* for a decree of specific performance pursuant to three agreements ('the composite agreements'), entered into by them on the same date, ie, on 5 April 2002. The defendants filed a counter-claim against the appellants and claimed, amongst others a declaration that the composite agreements were void and of no legal effect, and prayed for damages and costs. In this appeal, the first and third defendants are respectively referred to as the first and second respondents or collectively as the respondents. The second defendant is not involved with the appeal.

[3] On 5 May 2011, after a full trial, the High Court gave judgment for the appellants and granted the decree of specific performance. The respondents being dissatisfied with the High Court decision filed an appeal before the Court of Appeal. On 17 January 2012, it allowed the respondents' appeal with costs following which the High Court order of decree of specific performance was set aside. As regards the respondents' counter-claim which was yet to be resolved, the Court of Appeal ordered it to be remitted to the High Court before the same judge to hear the parties, and to make a reasoned judgment thereon. The High Court was ordered to take into account the evidence adduced during the trial before it, together with the effect of the decision of the Court of Appeal in respect of the appellants' claim. The High Court dismissed the respondents' counter-claim.

[4] In its grounds of judgment the Court of Appeal, *inter alia* adjudged as follows:

> Upon a true construction of clause 3, the said letter, the Agreed facts and the commercial purposes for which the three Agreements were entered into by the parties who are experienced in commercial matters, we are of the view that the conditions precedent contained in clause 3 remain unfulfilled. Hence, the three Agreements have clearly been suspended to enable the parties to consider their respective positions. There being no evidence that the suspension had been lifted, the agreements remained

suspended. That there remained part of the deposits being retained and that the Plaintiffs-Purchasers continued with the joint management and operation existed by virtue of paragraph 3 of the letter of 15 November 2002 which governs the further relationship between the parties after the suspension of the agreements. Not by virtue of the suspended agreements. The clear language of the letter provides no basis for the suggestion the letter was to give only the Plaintiffs-Purchasers time to consider its position. The evidence shows attempts to move forward, but these for one reason or another clearly failed, and the fact remained the suspension of the earlier agreements remained in force. In the circumstances, the learned Judge had erred in decreeing specific performance for the Plaintiffs-Purchasers in respect of the three Agreements.

The Antecedent And Facts Of This Appeal

[5] To fully understand the appeal, it is necessary for us to touch on the chronology of events that culminated in the execution of the composite agreements and the eventual litigation of the matter in 2007 (case 22-109-2007). We have alluded to and now reproduce much of the undisputed facts sourced from the statement of agreed facts and common documents. Since the events that took place prior to 5 April 2002 have a great bearing on the composite agreements we now discuss those pre-contractual events.

[6] Prior to 5 April 2002 (the date of the composite agreements), the first respondent was a secured creditor of a company called Ganda Plantations (Perak) Sdn Bhd ('Ganda') and Cempaka Sepakat Sdn Bhd ('Cempaka'). The first respondent had granted facilities to Techno-Asia Holdings Bhd ('TAHB') and amongst the securities pledged for the facilities were two parcels of oil palm plantation land belonging to Ganda and Cempaka. The two abovementioned pieces of land are:

(i) HS(D) LP 14132 Lot 6863 Mukim Of Hutan Melintang, Daerah Hilir Perak registered under the name of Ganda; and

(ii) HS(D) 13127 Lot 11644 Mukim Durian Sebatang, Daerah Hilir Perak registered under the name of Cempaka.

(hereinafter collectively referred to as the assets).

[7] TAHB later came under the purview of Pengurusan Danaharta Nasional Berhad ('Danaharta'). On or about 30 April 2001, Special Administrators ('SAs') were appointed in respect of Ganda and Cempaka under the provisions of the Pengurusan Danaharta Nasional Berhad Act 1998. Pursuant to two separate workout proposals dated 26 November 2001, as the chargors had defaulted, the assets were offered by the SAs to the first respondent in partial settlement of the loan facility granted by it. The first respondent accepted the workout proposal subject to the SAs transferring the assets to its nominee, ie, the second respondent. The assets were eventually transferred by the SAs and registered in the name of the second respondent on or about 5 August 2003.

[8] We now return to the aforesaid date of 5 April 2002 where the first respondent, the second respondent and the appellants entered into several written agreements referred to earlier as the composite agreements. The composite agreements comprise:

(i) a sale and purchase agreement (the first agreement) between the first respondent and the appellants whereby the first respondent, *inter alia*, agreed to sell and the appellants agreed to buy the entire paid up capital of the second respondent including the assets. Clause 3(1) a-g of the first agreement contained conditions precedent which required compliance by the respondents, such as the approvals to be obtained from the relevant authorities and the like;

(ii) a sale and purchase agreement (second agreement) between the second respondent and the appellants for the sale and purchase of the machinery and mill from the first respondent. A sum of RM100,000 being the first installment was paid under the second agreement; and

(iii) by way of the first respondent's letter dated 5 April 2002 and the supplementary agreement between the first respondent and the appellants, parties agreed that the first and the second agreements were to be inter-conditional and shall be completed together subject to certain conditions precedent.

[9] The total consideration for the first and second agreements was RM53 million. Together with the RM100,000 installment payment the appellants also paid an additional RM4 million to the first respondent pursuant to the composite agreements entered between them.

[10] The aforesaid conditions precedent (cl. 3 a-g), in substance to be fulfilled by the first respondent attached to the first agreement, *inter ali*a, are as follows:

(a) that the approval of the SAs be obtained to transfer the said assets (here being the plantations and the mill) to the second respondent;

(b) that the SAs shall execute all relevant documents to transfer the said assets free from encumbrances to the second respondent;

(c) that the approval for the transfer of the land mentioned in s. 1 of the First Schedule in favour of the second respondent be obtained from the Menteri Besar of Perak;

(d) that the approval from the Foreign Investment Committee be obtained for the transfer of the assets to the second respondent;

(e) that the assets be transferred to the second respondent free from encumbrances; and

(f) that the existing PORLA licence for the factory more specifically mentioned in s. 2 of the First Schedule be surrendered to the relevant authorities to enable the appellants or their nominees to apply for a new PORLA licence.

[11] Subsequent to the execution of the composite agreements the SAs entered into a series of agreements dated 4 June 2002 with the first respondent whereby the first respondent through the second respondent was to manage the assets and the mill. The first respondent thereafter delegated the management of the assets and the mill to the appellants and their nominees, namely one Goh Ah Peng and Buloga Pothal upon a sharing formula, evidenced by the appellants' and solicitors' letter dated 31 May 2002 read together with the appellants' indemnity dated 4 June 2002 and the first respondent's letter dated 6 June 2002. Later, when a new profit sharing arrangement was executed on 20 February 2003 between the appellants and the respondents, the respondents were guaranteed RM500,000 per month (RM6 million per year) and RM25,000 as rental for the mill.

[12] By a letter dated 12 August 2002, as the conditions precedent had yet to be fulfilled, the composite agreements were extended by another six months subject to a further payment of RM3 million together with the monthly interest of RM600,000. Later the extension, by agreement, as per letter dated 15 November 2002 was rescinded. The RM3 million was returned to the appellants.

[13] After the side agreements with the SAs on 4 June 2002 were made the first respondent made a proposal on 2 October 2002 to the SAs to purchase the mill for a purchase price of RM5.5 million. This became a reality on 5 August 2003 when the purchase was effected to the second respondent.

[14] On 15 November 2002, a letter was issued by the respondents to the appellants, stating that the parties had confirmed and accepted, *inter alia*:

> … that for the moment, each of us shall be entitled but reserved our respective rights to terminate the overall arrangement and understanding (including the Shares Agreement of 5 April 2002 which lapsed on 5 October 2002 since all relevant approvals have not been obtained) to enable each of us to consider our respective positions.

Parties' Arguments

[15] The appellants argued that the letter of 15 November 2002 issued by the respondents was executed by both parties, amongst others to give time to the first respondent to obtain the necessary approvals for the purchase of the mill, comply with the other conditions, and in the course of that period causing time for the completion of the conditions precedent to be put at large. The letter also gave a choice to the parties to terminate the agreement if they so wish.

[16] Having considered the composite agreements as still subsisting despite the 15 November 2002 letter, the appellants attempted to complete the sale by paying the second and final installment under the first agreement, together with the balance of the purchase price under the second agreement, but were rejected by the respondents. As evinced by letters dated 30 September 2003 and 6 October 2004 the appellants gave notice to the first respondent to complete the composite agreements.

[17] The appellants also come across strongly by submitting that by the very conduct of the respondents, together with the contents of the exchanged communication, never considered the composite agreements as having been terminated. The continuous consultation by the respondents with the appellants merely supported the latter's contention that the composite agreements were still subsisting.

[18] The respondents claimed that the letter dated 15 November 2002 was a "suspension agreement", as agreed to by the appellants, having the object of renegotiation between the parties due to the delay and other circumstances prevailing at that time.

[19] Tracing the submission of the respondents, their emphasis was the conditionality of the composite agreements, and with the conditions precedent of cl. 3 not fulfilled, the obligation to sell and buy had lapsed. Why the agreement was not expressly terminated by the respondents is answered in this way by the respondents:

> … what was also further expressly acknowledged by the parties was that each of the parties was entitled but reserved their respective rights to terminate the overall arrangement and understanding recognizing that there was still an outstanding account on the reduced deposits that the appellants had left with the respondents.

[20] The respondents further submitted that both parties had acknowledged that the composite agreements (vehemently denied to by the appellants) had lapsed but had decided to keep the agreements open for parties to re-negotiate a fresh agreement for the sale and purchase of the plantations and the mill. The continuing distinct management of the plantations was another aspect of their relationship which should not be connected to the sale and purchase of the assets.

Our View Of The 15 November 2002 Letter

[21] The respondents conceded in the course of the submission that the 15 November 2002 letter has to be construed by giving the ordinary and usual meaning for the various terms used by the parties. We have no disagreement over this concession as this is trite. Having perused the letter we find that the expressed terms, namely the stipulations that give efficacy to the intention of the

appellants and the respondents, are clear and unambiguous and apply accurately to the existing facts. The next step is to identify the intention. The intention may be gauged from the meaning of the words parties have said rather than what the parties meant to say; from there we give effect to their bargain (*Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23; *Central Bank of India v. Hartford Fire Insurance* AIR 1965 SC 1288; *Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd* [2006] 2 CLJ 337). The court in *Kamla Devi v. Takhatmal* AIR 1964 SC 859 comprehensively opined:

> If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the Court is not delved deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions.

[22] So, from a reading of the 15 November 2002 letter, were the expressed terms indicative of a "suspension agreement", in order for parties to return to the negotiation table caused by the delay in fulfilling the conditions precedent then, causing the contracts to lapse, or merely to give time to the first respondent to obtain the necessary approvals pending which, time was put at large?

[23] Interestingly in the written submission of the respondents they have consistently alluded to the phrase 'conditional contracts' for the composite contracts rather than for the formation of the entire contract dependent upon the conditions precedent. The appellants, regardless of the respondents' phraseology have argued consistently that the composite agreements were conditional contracts, the fulfillment of which was dependent upon the conditions precedents. On that premise they were on common ground.

[24] Having scrutinised the evidence, we have arrived at the following conclusion. We hold the view that the letter of 15 November 2002 reflects the latest position of the parties then, in relation to their rights, as agreed upon in the composite agreements. On a plain reading it merely means that the parties could not move forward to perform the three agreements as the

conditions for performance were still left unfulfilled, that is, if the conditions precedent were indeed not satisfied. The following statements (as found in the 15 November 2002 letter), *inter alia* that, "the palm oil is not for sale" as indicated by the SAs, followed by the remarks that "this recent event undermines our overall and strictly composite 2002 arrangement ... for the sale of the entire issued and paid up shares in Radiant Response Sdn Bhd (the second respondent)" and "since all relevant approvals have not been obtained", reflected how near impossible performance of the agreements was from the point of view of the respondents.

[25] By the terms of that 15 November 2002 letter, parties could take stock of their own position and in so doing thereafter elect to terminate at will, a right that was given to either party. The words, "each of us shall be entitled but reserves our rights to terminate ... to enable each of us to consider our respective positions" supports that view.

[26] The letter anticipated a time when parties would eventually decide whether to pursue or not with the composite agreements due to the allegation that the conditions precedent had not being fulfilled. Again, this is clearly borne out by the phrase, "We also confirm our understanding that until each of us decides on our final position ...".

[27] Appreciating the conduct of the respondents and deciphering the letter, not for a moment did the respondents assert that the composite agreements were void on account of the failure to fulfill the conditions precedent. Instead, as the respondents alleged parties were to take a breather, do what was needed to be done, and then decide whether to terminate the contracts or otherwise. The poser is when those conditions precedent were fulfilled could either party terminate the agreements pursuant to the letter of 15 November 2002? In the circumstances of the case, yielding to legal common sense once those conditions precedent were fulfilled, with no more formal impediment of performance outstanding, the reason for parties to terminate the agreements had evaporated (*Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 All ER 98).

[28] We now scrutinise the evidence adduced and decide whether the conditions precedent were indeed not fulfilled. From the evidence we conclude that the Court of Appeal misdirected itself when stating that the conditions precedent contained in cl. 3 had remained unfulfilled. The following, as found in the agreed facts statement, are the dates when the major conditions precedent were obtained (way before the 15 November 2002 letter):

(a) approval by FIC 20 June 2002;

(b) approval given by the state authority 16 August 2002; for transfer of the assets to the second respondent;

(c) resolution of the first respondent 23 August 2002 authorising sale of the assets to the appellant; and

(d) By 5 August 2003 the purchase of the mill became a reality when the purchase was effected to the second respondent.

[29] Only on 28 November 2007 was a notice of termination of the composite agreements served on the appellants, by which time the conditions precedent had been satisfied. With the conditions precedent satisfied what remained thereafter was performance. We see no reason why the respondents could validly resist the decree of specific performance after the impediments had been cleared in the circumstances of the case. The *raison d'etre* or reason for the contents of the 15 November 2002 letter vanished with the fulfillment of the conditions precedent.

Our Analysis Of The Other Relevant Facts

[30] Despite the abovementioned view, which is sufficient to vindicate the appellants' contention, for completeness, we have undertaken the following analysis regarding the facts.

[31] By 18 September 2002 the respondents had collected RM8,320,000 as deposit for the acquisition of the second respondent and the mill. RM4,200,000 was refunded though the balance of RM4.1 million was retained as deposits to be held on an interest free basis. The respondents' conduct of retaining part of the consideration sum paid by the appellants, in respect of the purchase of the second respondent, especially the first installment of RM100,000 under cl. 2(1) of the first agreement together with

the deposit of RM4.1 million interest free did not help the respondents' case and gave the indication that they had not abandoned the composite agreements.

[32] In the letter dated 7 August 2003 to the KLSE, when relating about a new profit sharing arrangement executed on 20 February 2003 between the appellants and themselves the respondents stated that the RM4.1 million was deposit on an interest free basis for the duration of the suspension agreement. The retention of the returnable deposits free of interest for a period of over five years certainly militated against the argument of the respondents that the contracts had lapsed (*National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282; [1983] 2 MLJ 211 and *Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd* [2003] 3 CLJ 201; [2003] 4 MLJ 152). In fact, persistently alluding to the terminology 'deposit' was of no help to the respondents' case either.

[33] In that letter of 7 August 2003, when explaining the abovementioned new profit sharing arrangement, the respondents explained that they were guaranteed RM500,000 per month payment (RM6 million per year), and RM25,000 as rental for the mill. Financial consideration therefore could not be discounted to be one of the reasons why the respondents did not terminate the composite arrangements, a fact which had not escaped the High Court's comments, particularly the financial benefits derived from the delay in terminating the composite agreements.

[34] Without the need to detail out the other pieces of evidence, how could the appellants not have a reasonable expectation that the respondents intended to pursue the contract to fruition? It was only on 28 November 2007 that the first respondent finally serve a notice of termination of the composite agreements, ie, five years and thirteen days later. They also offered to tender the refund of the aforesaid RM4.1 million paid as deposit though challenged by the appellants *vide* letter of 12 December 2007. By then all the conditions precedent had been fulfilled.

[35] We now briefly discuss the questions for our determination. The poser for the first question is whether ss. 32 to 34 of the Contracts Act 1950 apply to suspended contracts containing conditions precedent to be fulfilled. These three sections fall under Part IV falling under 'OF CONTINGENT CONTRACT' of the Contracts Act 1950. They read as follows:

A s. 32 : A 'contingent contract' is a contract to do or not to do something, if some event, collateral to the contract, does or does not happen.

s. 33: (a) Contingent contracts to do or not to do anything if an
B uncertain future event happens cannot be enforced by law unless and until that event has happened.

(b) If the event becomes impossible, such contracts become void

C s. 34 : Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not happening.

D **[36]** The answer to question (i): is in the affirmative.

[37] The poser for question (ii) reads whether in the circumstances reliance on the cases of *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282; [1983] 2 MLJ 211 and *Ideal City Development Sdn Bhd v. Dynamic*
E *Mould Sdn Bhd* [2003] 3 CLJ 201; [2003] 4 MLJ 152 (a Court of Appeal case) as stating the correct law on contingent contracts could apply to contracts containing conditions precedent which are suspended. Our answer is that since the conditions precedent
F had all been satisfied with the exception of the mill, but still effected to the second respondent on 5 August 2003 the two cases therefore are inapplicable thus relieving us of the necessity to supply an answer to the question.

[38] Taking the matter a step further, in the unlikely event that
G the conditions precedent had been suspended and thus not fulfilled, question (ii) will be answered in the affirmative.

[39] Answer to questions (iii) and (v): affirmative.

H **[40]** Answer to question (iv): affirmative subject to the lifting of suspension by the other party.

[41] Answer to question (vi): negative.

I

Conclusion

[42] We therefore allow this appeal with costs of RM150,000 for here and the court below including costs for the leave application. All the orders of the Court of Appeal are set aside and the orders of the High Court be reinstated. The decree of specific performance is reinstated and the counter claim dismissed. We further order the balance sum of RM48.9 million be refunded within one month from the date of this order.

[43] Deposit is ordered to be refunded.